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L-J, Inc. v. Bituminous Fire & Marine Insurance Co.: In Determining Coverage Under Commercial General Liability Policies, Should Policy Language or Public Policy Control?

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L-J, INC. V. BITUMINOUS FIRE & MARINE INSURANCE CO.: IN DETERMINING COVERAGE UNDER COMMERCIAL GENERAL LIABILITY POLICIES, SHOULD POLICY LANGUAGE OR PUBLIC POLICY CONTROL?

I. INTRODUCTION

In August 2004, the South Carolina Supreme Court issued a decision that will have a serious impact on the construction industry and construction law practitioners in South Carolina. In *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*,[1] the South Carolina Supreme Court held Bituminous was not responsible for covering a contractor's faulty workmanship.[2] The court failed to reach the underlying issues of policy exclusions and exceptions, and instead ruled faulty workmanship does not rise to the level of an "occurrence" under a commercial general liability policy.[3] This decision affects the way construction lawyers practice in South Carolina and limits the abilities of injured consumers to recover for damaged property. By analyzing the *Bituminous* facts on a public policy basis rather than by analyzing the language of the insurance policy at issue, the supreme court not only limited the rights for recovery in construction law defect cases in South Carolina, but also opened the door for many coverage questions under general liability policies.

This Note focuses on the impact of *Bituminous*, its effects on South Carolina construction law and policy, and the changes attorneys should expect in construction law litigation in the decision's aftermath. Part I provides a summary of the supreme court's decision, as well as the case's procedural history. Part II examines the history of commercial general liability policies and changes made to policy forms over the years. Part III first analyzes the supreme court's decision by comparison to the South Carolina Court of Appeals' examination of this issue, and then considers the effects of policy language and public policy in this case and other construction defect cases. Part IV concludes this Note by exploring the impact *Bituminous* will have on construction law disputes in the future.

II. THE DECISION

A. Facts

Contractor L-J, Inc. (Contractor) began construction of a roadway for the Dunes West Joint Venture (Developer) in 1989 and completed the project in 1990.[4] By 1994 the roadway had deteriorated to such a point that the Developer brought suit against the Contractor for breach of warranty, breach of contract, and

1. No. 25854, 2004 S.C. LEXIS 190 (S.C. Aug. 9, 2004).
2. *Id.* at *9.
3. *Id.* at *6–7.
4. *Id.* at *2.

negligence.[5] Experts attributed the damage to faulty preparation of the subgrade (including failure to remove tree stumps and to compact the soft clay sufficiently), a road course that was too thin, excessive traffic, and an improper drainage system.[6] Several insurers provided commercial general liability (CGL) coverage for the project, including Bituminous, whose policy period began in 1990 and ended in 1992.[7]

B. Procedural History

After the Contractor and Developer settled out of court for $750,000, the Contractor sought indemnification from the insurers covering the project.[8] Three of the insurers agreed to indemnify the Contractor in the amount of $362,500, but Bituminous refused to cover the claim.[9] The Contractor and the three former insurers then brought a declaratory judgment action against Bituminous, seeking contribution for part of the settlement amount and indemnification for defense costs.[10]

The circuit court referred the declaratory judgment action to a special master, who determined "the damage to the roadway system was covered under the Bituminous policy."[11] In addition, the master found that the damage to the roadway did in fact constitute an "occurrence" under the policy; the "expected or intended" consequences and "your work" exclusions did not exclude Bituminous from coverage because a subcontractor performed the work on the Contractor's behalf.[12] The master ordered Bituminous to pay $103,571.42 to the other carriers.[13]

Bituminous appealed on the grounds that no "occurrence" had arisen according to the meaning of the policy, and even if an occurrence had taken place, it did not trigger the policy exclusions.[14] Affirming the master's decision, the court of appeals found not only the existence of an occurrence under the policy, but also that "the products-completed operations hazard and subcontractor exception provisions restore coverage that would otherwise have been excluded by the 'your work' provision."[15]

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5. *Id.*
6. *Id.* at *5.
7. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190, at *2–3 (S.C. Aug. 9, 2004).
8. *Id.* at *3.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190, at *4 (S.C. Aug. 9, 2004).
14. *Id.*
15. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C. 549, 560, 567 S.E.2d 489, 495 (Ct. App. 2002).

C. *The Supreme Court's Holding and Reasoning*

As its first issue, the supreme court addressed the definition of an "occurrence" under the CGL policy and whether or not the deterioration of the roadway in this case constituted such an "occurrence."[16] The court agreed with Bituminous that the "court of appeals erred in determining that the property damage resulting from the faulty grading and construction of the roads at Dunes West constituted an 'occurrence' under its CGL policy with the Contractor."[17] The court elaborated on this conclusion:

> While the alligator cracking may have constituted property damage, we find that no "occurrence" took place as defined by the CGL contract. According to the deposition testimony, the only "occurrences" were various negligent acts by the Contractor during road design, preparation, and construction that led to the premature deterioration of the roads .... We find that all of these contributing factors are examples of faulty workmanship causing damage *to the roadway system only*, which does not fall within the contractual definition of "occurrence" under Bituminous's CGL policy.[18]

The court reasoned that a contractor would perhaps be able to recover if his faulty workmanship resulted in personal injury or property damage to another.[19] Nevertheless, the court opined that if the only loss the developer suffered is to the property or product itself, then that loss would fall under the category of an economic loss and which the contractor must bear as part of the business risk it assumed in taking the job.[20] The court summarized its argument by emphasizing the roadway damage in this case was the result of faulty workmanship alone, could not constitute an accident, and ultimately did not rise to the meaning of an occurrence as intended by the CGL policy.[21]

The next two issues the court agreed to review on certiorari required the court to construe the meaning of the CGL policy language by resolving two questions: (1) Did the Contractor expect or intend deterioration of the roadway? and (2) Did the "your work" exclusion become inapplicable because a subcontractor performed the work to the roadway?[22] The court refused to address whether the Contractor expected or intended the damage to the roadways, because in determining that the damage to the road did not constitute an "occurrence," the court eliminated the need to analyze this issue.[23]

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16. *Bituminous*, 2004 S.C. LEXIS 190, at *5–6.
17. *Id.* at *5.
18. *Id.* at *6–7.
19. *Id.* at *9.
20. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190, at *9 (S.C. Aug. 9, 2004).
21. *Id.* at *10.
22. *Id.* at *11.
23. *Id.*

Although finding no occurrence also rendered moot the question of whether the damage fell within the "your work" exclusion, the court decided to address this issue in order to clarify the court of appeals' holding that "an exception to an exclusion 'restores' coverage."[24] In trying to reverse and clarify this issue, however, the court only muddied the waters. The supreme court agreed with the court of appeals that the subcontractor exception found in the policy rendered the "your work" exclusion inapplicable, but it held that "[i]n stating that the exception to the exclusion 'restores' coverage, the court of appeals overlook[ed] existing law, which states that 'an exclusion does not provide coverage but limits coverage.'"[25]

On its face the court's holding appears sound and logical. In rendering this decision, however, the court left many important questions unanswered and perhaps created more confusion than clarification.

III. A BRIEF HISTORY OF COMMERCIAL GENERAL LIABILITY POLICIES

One of the main arguments that the respondent Home Indemnity Company presented to the South Carolina Supreme Court in the petition for rehearing involved the supreme court's failure to consider the changes in commercial general liability policies over the past few decades and how these changes should have affected the court's decision.[26] Commercial general liability policies "frequently utilize a form drafted and revised from time to time by the Insurance Services Office ('ISO')," and the ISO revised this form in 1966, 1973, 1986, and 1993.[27] The 1986 revisions are the applicable revisions in *Bituminous,* though the court seemed to base its decision on the 1973 form. In *Bituminous*, the court heavily relied upon an earlier decision, *C.D. Walters Construction Co. v. Fireman's Insurance Co.*,[28] which held an insurer was not responsible to defend an insured for damage arising out of the insured's own faulty workmanship.[29] *C.D. Walters Construction* dates back to 1984, though, and the court did not take into account the policy changes effective in 1986.[30]

Numerous scholarly articles and treatises stress the importance of understanding the 1986 commercial general liability policy changes in order to determine accurately coverage of faulty workmanship claims under these policies.[31]

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24. *Id.*

25. *Id.* at *12–13 (quoting Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 378–79, 368 S.E.2d 674, 675–76 (Ct. App. 1998)).

26. Respondent's Petition for Rehearing and Request for Oral Argument at 2, L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190 (S.C. Aug. 9, 2004) (No. 200224509).

27. Lee H. Ogburn, *The "Work" and "Products" Exclusions and the "Professional Liability" Exclusion, in* INSURANCE COVERAGE FOR DEFECTIVE CONSTRUCTION, TORT AND INSURANCE PRACTICE SECTION 475, 477 (1997).

28. 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984).

29. *See* L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190 (S.C. Aug. 9, 2004) (citing *C.D. Walters*, 281 S.C. at 598, 316 S.E.2d at 712).

30. *See* Respondent's Petition for Rehearing, *supra* note 26, at 2.

31. *See* 4 PHILLIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW §11:28; William D. Lyman, *Is Defective Construction Covered Under Contractors' and Subcontractors' Commercial General Liability Insurance Policies?, in* HANDLING

Examining the history and reasons for these policy revisions should be the most critical step in discerning the meaning behind the policies and how courts should use the policies to interpret issues like those found in *Bituminous*. Current CGL policies include certain exclusions that apply specifically to construction defects.[32] These exclusions have been "narrowed over the past thirty years to broaden coverage, and by general agreement the newer policy does not eliminate coverage for all property damage related to construction defects . . . demonstrat[ing] that the . . . policy anticipates the 'occurrence' of construction defects and covers some resulting property damage."[33]

The basis of coverage in the construction context began with the standard CGL policy form of 1973.[34] This policy contained a form exclusion, known as the "business risk exclusion[]," for damage to "work" and "products." The business risk exclusion excluded coverage for the following:

> (n) property damage to the *named insured's products* arising out of such products or any part of such products; [and]
> (o) property damage to *work performed by or on behalf of the named insured* arising out of the work or any portion thereof; or out of materials, parts or equipment furnished in connection therewith.[35]

Most courts interpreted this policy as excluding most types of damage discovered from construction projects.[36]

Because the exclusion in the 1973 policy severely limited recovery for damages arising from construction, beginning in 1976, insurers offered insureds the chance to broaden their coverage through an endorsement known as the "Broad Form Property Damage Endorsement" (BFPD).[37] By paying a higher premium, contractors could gain more coverage under this endorsement, because it replaced exclusion (o) of the 1973 form with three other exclusions containing a more limited scope.[38] The new exclusions made coverage inapplicable to the following "particular part[s]" of the damaged property:

> (p) To *that particular part of any property. . .*

CONSTRUCTION RISKS 2003, at 505 (PLI Real Estate Law and Practice Course Handbook Series No.-00BY, 2003); Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 TORT & INS. L.J. 785, 786 (1995); James Duffy O'Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, CONSTRUCTION LAWYER, Winter 2001, at 15; Clifford J. Shapiro, *Inadvertent Construction Defects Are an "Occurrence" Under CGL Policies*, CONSTRUCTION LAWYER, Spring 2002, at 13.

32. Shapiro, *supra* note 31, at 13.
33. *Id.*
34. *Id.*
35. *Id.* at 13–14.
36. *Id.* at 14.
37. *Id.*
38. Shapiro, *supra* note 31, at 14.

(i) *upon which operations are being performed* by or on behalf of the named insured at the time of the property damage arising out of such operations; or
(ii) *out of which any property damage arises*, or,
(iii) the restoration, repair or replacement of which has been made or is necessary *by reason of faulty workmanship thereon* by or on behalf of the insured.[39]

Insurers and policyholders could never agree as to the meaning of the faulty workmanship language found in exclusion (iii).[40] This lack of consensus seems to be at the center of the debate with 2004 CGL policies. Litigation arose as to the meaning of "that particular part" as well as to whether or not the faulty workmanship exclusion applied only to work in progress or to claims arising from work already completed.[41] In terms of completed operations, the deletion of provision (o) of the 1973 form resulted in the addition of "language designed to broaden coverage for property damage caused by the work of subcontractors."[42] By deleting the phrase "on behalf of the named insured" found in provision (o), "the BFPD for the first time expressly differentiated coverage based on whether the property damage occurred before or after operations were complete."[43] Contractors who failed to purchase the BFPD, however, still had limited coverage, as the policy without the BFPD "specifically excluded coverage for completed operations."[44]

By 1986, trends in the industry and various market forces directed narrowing exclusions in favor of broader coverage and the requirement that standard CGL policies should include coverage for completed operations.[45] The revisions made to the 1986 policy are crucial to determining coverage for faulty workmanship claims.[46] "[T]he 1986 policy makes clear that the 'work' exclusion for property damage to completed operations does *not* apply where the property damage is [sic] to or arises out of the work of subcontractors."[47] The revised policy specifically states, "'This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.'"[48] By adding this exception to CGL policies, insurers must have intended for the damage due to faulty workmanship of a subcontractor to constitute an occurrence for which the policy would provide coverage.[49] If insurers had not intended for the policy to

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Franco, *supra* note 31, at 805.
45. *Id.*; *see* Shapiro, *supra* note 31, at 14.
46. *See* Limbach Co. v. Zurich Am. Ins., 396 F.3d 358 (4th Cir. 2005). This case examines a CGL Policy taking into account the 1986 policy revisions. The court held "the 'your work' exclusion does not preclude coverage for the cost of repairing the damaged [work]. To hold otherwise would be to ignore the unambiguous terms of the exclusion's exception for work performed by a subcontractor." *Id.* at 365.
47. Shapiro, *supra* note 31, at 14.
48. *Id.*
49. *Id.*

cover faulty workmanship, undoubtedly they would not have made these policy revisions. Still, many jurisdictions disagree as to the interpretation of these policy revisions: "[N]o consensus among lawyers or courts as [to] what is intended to be covered by CGL policies" exists.[50]

IV. ANALYZING THE POLICY: COMPARING THE APPROACHES OF THE SUPREME COURT AND THE COURT OF APPEALS

Perhaps the South Carolina courts would have arrived at the same decision in *Bituminous* had both courts realized the key to interpreting the meaning of CGL policies and their exclusions lies in consulting not only the history of the policy forms, but also the policy language itself.[51]

A. The Court of Appeals' Decision

Arguably, the South Carolina Court of Appeals resolved the issues in *Bituminous* correctly by analyzing them solely in terms of the policy language. The court of appeals began its discussion of the issues by asserting, "'Insurance policies are subject to the general rules of contract construction . . . . Court[s] must give policy language its plain, ordinary, and popular meaning.'"[52] With this in mind, the court began its resolution of the arguments against coverage presented by Bituminous:

> We thus look to the language of the policy to determine whether the deterioration and failure of the roads from repeated water runoff is an "occurrence." The policy provides coverage for property damage caused by an "occurrence" and defines "property damage" as . . . [p]hysical injury to tangible property, including all resulting loss of use of that property . . . . There is no coverage for property damage that is "expected or intended from the standpoint of the insured." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In this case, it is undisputed that repeated exposure to surface water runoff caused the pavement to fail. The pavement is tangible property. The policy provides coverage for continuous and repeated exposure to harmful conditions causing damage to tangible property. Under the clear language of the policy, the repeated exposure to water is an "accident" and therefore an "occurrence."[53]

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50. Lyman, *supra* note 31, at 519.

51. O'Connor, *supra* note 31, at 15.

52. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C. 549, 554, 567 S.E.2d 489, 492 (Ct. App. 2002) (quoting Century Indem. Co. v. Golden Hills Builders, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002)).

53. *Id.* at 554–55, 567 S.E.2d at 492.

By analyzing the policy language, the court of appeals found not only that the damage to the roadway was an "occurrence," but also that in light of the business risk doctrine, the subcontractor's exception to the exclusion covered the damage.[54] In rebutting Bituminous's argument that faulty workmanship alone cannot rise to the level of an occurrence, the court agreed that faulty workmanship alone was not an occurrence but found that if the workmanship caused an accident, it would be an occurrence.[55] The court of appeals found the property damage in this situation was the failure of the road surfaces.[56]

The court reinforced its determination of coverage by again looking at the policy language:

> Resuming our examination of the policy, we come to exclusion (*l*). This exclusion bars coverage for "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."(sic).
>
> Once again an exclusion appears to bar coverage, but reading further we see the "your work" exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." It is undisputed in this case that the defective work was performed by a subcontractor. This clear and unambiguous policy language restores coverage.[57]

The court of appeals recognized the historical changes to the CGL policies in its decision and interpreted the policy in light of the 1986 revisions. The court asserted the insurance industry, "[f]or whatever reason," made the decision to make this revision, and therefore the court could "not ignore that language when interpreting case law decided before and after the addition."[58]

B. The Supreme Court's Approach

Instead of analyzing the specific policy at issue in *Bituminous*, the supreme court chose to render its decision based on past decisions of the South Carolina Court of Appeals, as well as a law review article explaining the purpose of the business risk doctrine.[59] In reaching its conclusion, "[t]he Court mistakenly failed to consider the evolution of liability policy forms and, in particular[,] the terms of the Bituminous policy."[60]

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54. *Id.* at 555–58, 567 S.E.2d at 492–94.
55. *Id.* at 556, 567 S.E.2d at 493.
56. *Id.* at 557, 567 S.E.2d at 493.
57. *Id.* at 558, 567 S.E.2d at 494.
58. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C. 549, 558–59, 567 S.E.2d 489, 494 (Ct. App. 2002).
59. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190, at *7–9 (S.C. Aug. 9, 2004).
60. Respondent's Petition for Rehearing, *supra* note 26, at 6.

In addressing the issue of whether or not faulty workmanship constituted an occurrence under Bituminous's CGL policy, the court examined the issue in terms of the pre-1986 policy revisions. The majority of the precedent upon which the court relied to support its holding dated earlier than 1986.[61] The court, and the insurance industry for that matter, seemed to "hold[] up as the main obstacle to property damage coverage caused by defective construction . . . not the insurance contract itself, but a theoretical concept popularized in a law review article . . . authored two years before the insurance industry revised the CGL form."[62]

The supreme court examined the policy for its definition of an occurrence, but without delving into the meaning of the definition, it decided that no occurrence took place. The court justified its decision by looking at the court of appeals' decision in *C.D. Walters Construction* and Roger C. Henderson's law review article dealing with the business risk doctrine.[63] Though both the case and the article make strong points on faulty workmanship and the reasons that a CGL policy does not cover it, neither takes into account the 1986 revisions to CGL policies or the purpose for those revisions.

The court relied on Henderson's article for his analysis of the business risk doctrine and the assertion that "coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."[64] The court then asserted, "[T]he Contractor should not be able to recover, under a CGL contract, for the economic loss suffered by the Developer due to the Contractor's failure to sufficiently design, compact, and pave the roadway system."[65] The court neglected to acknowledge that in this case, the subcontractor, not the Contractor, failed "to sufficiently design, compact, and pave the roadway system."[66]

In holding "the Contractor must bear the loss as a consequence of the business risk it assumed upon submitting its bid to construct the roadway system," the court relied on the old version of the business risk doctrine as explained by Henderson.[67] This business risk doctrine of 1971 no longer applies to work by subcontractors. Because of the broadening of coverage under the 1986 revisions to the CGL policy, it applies only to work a contractor performed.[68] By basing its reasoning not on the policy but on an out-of-date interpretation of the policy, the supreme court paved

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61. *See, e.g.*, C.D. Walters Constr. Co. v. Fireman's Ins. Co., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (denying coverage for property damage arising out of faulty workmanship); Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415 (1971) (offering an overview of insurance coverage for products liability to lawyers who represent manufacturers, wholesalers, and retailers).

62. O'Connor, *supra* note 31, at 15.

63. *Bituminous*, 2004 S.C. LEXIS 190, at *7–9 (citing *C.D. Walters Constr.*, 281 S.C. at 597–98, 316 S.E.2d at 712; Henderson, *supra* note 61, at 441).

64. *Id.* (quoting Henderson, *supra* note 61, at 441).

65. *Id.* at *9.

66. *Id.*

67. *Id.* (citing Henderson, *supra* note 61, at 441).

68. *See* Amicus Petitioners' Petition for Rehearing at 10, L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2004 S.C. LEXIS 190 (S.C. Aug. 9, 2004) (No. 200224509).

the way for insurance companies to avoid coverage in any situation of defective work, even though the insurance companies themselves chose to broaden this type of coverage through the 1986 revisions.

C. Should Public Policy or Policy Language Control?

In the case at hand, instead of ruling based on the policy language, the South Carolina Supreme Court ruled based on public policy: Contractors should be held liable for defective workmanship, regardless of policy language or whether or not the work was their own or that of a subcontractor.

Several public policy reasons disallow recovery under a CGL policy for property damage arising out of faulty workmanship.[69] First, allowing recovery would provide the double payment to the contractor.[70] If the contractor recovers for faulty workmanship after accepting payment for completing the job, the contractor is accepting payment from the insurer for correcting a job that should have been performed correctly in the first place.[71]

The second public policy reason for disallowing recovery for faulty workmanship arises from the feeling that allowing such recovery would provide a disincentive for contractors to perform their jobs well.[72] Further, the intent of CGL policies is not "to serve the purpose of a builder's performance bond, which shifts the risk of poor performance away from the owner but not away from the contractor."[73] Finally, courts often feel that contractors are in the best position to avoid such damage "by properly performing the work."[74]

Though all the above policy reasons are sound, the court chose the wrong case and the wrong grounds to assert such public policies. The CGL policy does not and should not cover a contractor who negligently performs his duties according to the contract. A contractor who employs a subcontractor to perform a job, however, should not be liable if the subcontractor's work affects the job as a whole. CGL policies intend to cover this type of situation, and the ISO revised policy forms in 1986 for the very purpose of making certain this would be covered.[75]

Examining this public policy reasoning in light of *Bituminous* makes apparent that the reasons behind these public policies are not at issue in this case. For instance, the first reason for disallowing recovery was the fact that a contractor should not receive payment from an owner and then payment from the insurer, because this would amount to a double recovery.[76] Here, the Contractor did not receive double recovery. He paid part of the money received from the Developer

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69. *See* JOHN G. CAMERON, JR., A PRACTITIONER'S GUIDE TO CONSTRUCTION LAW § 2.03(c) (ALI-ABA Comm. on Continuing Prof'l Educ. ed., 2000); Nina Reid Mack & Francis M. Mack, *Construction Claims Under the Comprehensive General Liability Policy*, 40 S.C. L. REV. 1003, 1004–08 (1989).

70. CAMERON, *supra* note 69, § 2.03(c) (citing LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325, 326–27 (Fla. 1980)).

71. Mack & Mack, *supra* note 69, at 1005.

72. *Id.*

73. *Id.*

74. CAMERON, *supra* note 69, §2.03(c) (citing *LaMarche*, 390 So. 2d at 326–27).

75. *See supra* notes 45–48 and accompanying text.

76. *See supra* notes 70–71 and accompanying text.

to the subcontractor. Thus, when the roadway was damaged, had it not been for the other insurance policies contributing to the settlement, the Contractor likely would have had to spend money out of his own pocket to repair the damage (assuming he did not seek indemnification from the subcontractor).

Next, the Contractor did not perform the work that was defective, so allowing him to recover under the insurance policy would not have provided an incentive for him to continue to perform in a faulty manner.[77] Instead, recovery probably would have encouraged him to hire subcontractors more cautiously. Finally, as the court of appeals expressed in *Bituminous*, although allowing recovery in this case may make the policy more like a performance bond, the policy language and the changes to policy forms make it clear that the court has "not made the policy closer to a performance bond for general contractors, the insurance industry has."[78]

The court of appeals, by referring to the actual CGL policy, asserted a tried and true policy of its own: looking to the language of the policy is the best way to determine coverage. Construction lawyers and contractors should follow suit and continue to use the policy language as the "not-so-secret-weapon" to overcome the insurers' attempt to avoid providing coverage.[79] The proof is in the policy, and if courts begin examining construction defect cases in light of the policy language, more just and uniform decisions will result.[80]

IV. CONCLUSION

The effects of *Bituminous* will be long-lasting and detrimental to the construction industry and to the construction law field. If the supreme court is starting down a path of ignoring the policy language in determining coverage, this course will magnify coverage questions. Not only will litigation over these issues continue to increase, but contractors also will face increased risks, and they will be left "without the benefit of the coverage that they purchased."[81] At the extreme, the decision in this case might hurt the industry by forcing contractors to seek relief in the bankruptcy courts if they cannot afford to cover the costs their insurance plans should have covered. At the least, insurance companies will begin a trend of refusing to provide coverage for defective work, regardless of the circumstances. As soon as the supreme court released this opinion, construction lawyers all over South Carolina began receiving calls from insurance companies as these companies began declining settlement offers, canceling scheduled arbitrations, and refusing to provide coverage under existing policies.

On top of the effects on the construction industry and construction lawyers, this decision will likely leave innocent property owners and home owners to absorb the costs of property damage that defective construction causes.[82] If insurance companies refuse to provide coverage for such damage, who will? Contractors

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77. *See supra* note 72 and accompanying text.

78. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C. 549, 559, 567 S.E.2d 489, 494 (Ct. App. 2002).

79. O'Connor, *supra* note 31, at 20.

80. *Id.*

81. Respondent's Petition for Rehearing, *supra* note 26, at 1.

82. Respondent's Petition for Rehearing, *supra* note 26, at 1–2.

likely do not have the reserve funds to cover the high costs of damage that usually arise in these cases. Property owners will be the ultimate victims of this decision, "which is repugnant to the South Carolina policy of protecting the new home buyer" and property owners.[83]

As this Note illustrates, determinations of coverage in construction defect cases courts should base solely on the language of the policy and in consideration of the reasons behind the CGL policy changes in 1986.[84] By failing to construe the policy language as it was intended, the South Carolina Supreme Court opened the door to continued litigation of construction defect claims, provided insurance companies a way to refuse coverage (despite their own attempts to extend coverage by narrowing exclusions in the policy language), and forced contractors and potentially innocent property owners to bear the risk of loss if subcontractors perform their work negligently. In one sweep of its pen, the supreme court brushed all arguments for coverage for defects under the rug and virtually voided the importance of policy language in determining coverage in commercial general liability cases.[85]

Anne Marie McNeil

83. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

84. *See supra* note 46.

85. During the pendency of this Notes' publication, the South Carolina Supreme Court granted a petition for rehearing in *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*